

IN THE COURT OF APPEALS OF IOWA

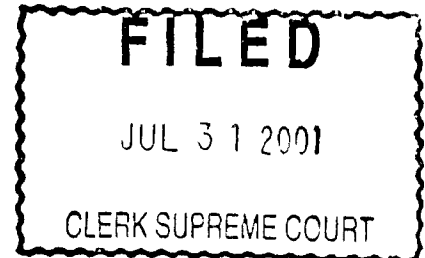
No. 1-089 / 00-0448

Filed July 31, 2001

IN RE THE MARRIAGE OF DEANNA MARY DAEGES
AND PATRICK JOSEPH DAEGES

Upon the Petition of
DEANNA MARY DAEGES,
Petitioner-Appellee/Cross-Appellant,

And Concerning
PATRICK JOSEPH DAEGES,
Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Pottawattamie County, Gordon C.
Abel, Judge.

The respondent appeals, and petitioner cross-appeals, from various
economic provisions of the parties' dissolution decree. **APPEAL AFFIRMED AS
MODIFIED. CROSS-APPEAL DISMISSED.**

Michael J. Murphy of Rodenburg Law Offices, P.C., Council Bluffs, for
appellant.

Joseph H. Hrvol, Council Bluffs, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

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MILLER, J.

The husband appeals and the wife cross-appeals various economic provisions of the parties' dissolution decree. The husband claims: (1) the division of property was inequitable; and (2) the district court should not have awarded the wife lifetime alimony.¹ The husband has also filed a motion seeking to dismiss the wife's cross-appeal on the ground on untimeliness. In her cross-appeal, the wife claims: (1) she should have been awarded a greater amount of alimony; and (2) the court abused its discretion by not ordering the husband to pay her trial attorney fees. On the appeal, we affirm as modified. We dismiss the cross-appeal.

Patrick and Deanna Deages were married in 1965. They have three children who are now adults. During the marriage the parties lived at 4119 Avenue D in Council Bluffs, Iowa. At the time of the dissolution hearing, Patrick was fifty-four years old and Deanna was fifty-two years old.

Patrick has been employed for more than thirty years with Crown Cork and Seal Company. He earns \$19.15 per hour, which gives him a base salary of almost \$40,000. In the past he has worked substantial overtime, and has earned gross annual income of between \$42,000 to \$50,000. Deanna began working outside the home in 1982 or 1983. She has primarily held part-time or low-paying positions. She currently is employed full-time for Betty's Flowers, where she earns \$8 per hour, which gives her gross annual income of \$16,640.

¹ The husband also raises an issue requesting that each party pay his or her own appellate attorney fees. Because the wife does not seek appellate attorney fees we do not address this issue.

During the marriage the parties purchased three parcels of real estate-- the marital residence on Avenue D, 2.5 vacant lots on Avenue D, and a house at 2542 Avenue B. The house on Avenue B was purchased as a rental property, but after the parties separated Deanna began living there. Patrick's hobby is fixing old cars, and the parties owned several older-model vehicles.

The district court issued a dissolution decree for the parties on February 9, 2000. The court determined Patrick should pay Deanna permanent alimony of \$350 per month until either party dies or Deanna remarries. The court divided the parties' property to award Patrick the marital residence, his vehicle, the other vehicles, his life insurance, and IRA. The court found the value of these assets to be \$127,000. Patrick was also awarded his pension, which the court did not separately assess a value. The court awarded Deanna the house on Avenue B, the vacant lots, her vehicle, her life insurance, and her IRA. These assets were valued at \$116,000. The court ordered Patrick to pay Deanna a lump sum property settlement of \$5500. Patrick appealed and Deanna cross-appealed.

I. Scope of Review

Appellate review of this equitable proceeding is de novo. Iowa R. App. P. 4. The court has a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993). The appellate court gives weight to the fact findings of the district court, especially in determining the credibility of witnesses, but is not bound by them. Iowa R. App. P. 14(f)(7).

II. Cross-Appeal

Patrick filed a motion to dismiss Deanna's cross-appeal on the ground it was untimely. The Iowa supreme court has ordered this motion to be submitted with the appeal. The dissolution decree was served and filed on February 9, 2000. Patrick filed his notice of appeal on March 9, 2000. Deanna's notice of cross-appeal was served and filed on March 16, 2000.

Iowa Rule of Appellate Procedure 5 provides, "A cross-appeal may be taken within the thirty days for taking an appeal or in any event within five days after the appeal was taken." Here, Deanna's cross-appeal was taken more than thirty days after the district court decision and more than five days after Patrick's appeal. Where a cross-appeal is untimely, it should be dismissed for lack of jurisdiction. *In re Marriage of Davis*, 608 N.W.2d 766, 773 (Iowa 2000); *State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210, 214 (Iowa 1991). We dismiss Deanna's cross-appeal as untimely.

III. Alimony

Patrick contends Deanna is not entitled to permanent alimony of \$350 per month. He claims Deanna has the ability to earn a greater income, but she prefers to remain at Betty's Flowers. He also claims his future with Crown Cork is uncertain. Although Patrick was not laid-off, recently the company laid off some employees. Patrick suffered a work-related injury to his ankle in 1997, and may still need further surgery on his ankle.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). The discretionary award of alimony is made after

considering those factors listed in Iowa Code section 598.21(3). *In re Marriage of Sychra*, 552 N.W.2d 907, 908 (Iowa Ct. App. 1996). We consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998).

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Traditional alimony analysis may be used in long-term marriages where life patterns have largely been set and the earning potential of both spouses can be predicted with some reliability. *Kurt*, 561 N.W.2d at 388. Traditional or permanent alimony is usually payable for life or for so long as a spouse is incapable of self-support. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997).

We determine Deanna is entitled to traditional alimony. Deanna has never earned much more than she is presently earning. Her earning capacity will never approach that of Patrick. By the parties' agreement, she was a homemaker for many years and did not seek employment while the children were young. Patrick's claims regarding his future employment are speculative. We consider the facts as they are at the time of the dissolution hearing. Based on these facts, we affirm the alimony award.

IV. Property Division

Patrick asserts the property division is inequitable to him. He claims the court improperly valued the parties' assets. He asks to have the cash property

settlement of \$5500 eliminated, and asks instead for Deanna to be ordered to pay him about \$23,000.

The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Wendell*, 581 N.W.2d 197, 199 (Iowa Ct. App. 1998). The property distribution should be made pursuant to the criteria codified in section 598.21(1). *In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa 1997).

Where the value of property is well within the permissible range of evidence, we will not disturb it upon appeal. *In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997). An owner may qualify as competent to testify to the value of personal property and real property. *Id.* (personal property); *Holcomb v. Hoffschneider*, 297 N.W.2d 210, 213 (Iowa 1980) (real property).

Deanna testified the property on Avenue B was worth \$60,000, which is what the parties paid for it in 1997. Patrick presented an appraisal which showed the property was worth between \$65,000 to \$72,000. The district court determined the property was worth \$60,000, and we find this to be within the permissible range of the evidence.

Deanna testified the marital residence on Avenue D was worth \$150,000. Patrick obtained an appraisal from a real estate agent, who valued the property at \$128,000. The district court determined the property was worth \$135,000. Again, this is within the permissible range of the evidence and we will not disturb the district court's decision.

When considering the other property issues raised by Patrick, we note he was awarded the entire amount of his pension plan, which has accumulated throughout the marriage while Patrick has been employed at Crown Cork. The district court did not place a value on the plan. However, Patrick presented evidence to show that if he retired at the time of the dissolution hearing he would receive benefits of \$836.32 per month. Thus, Patrick was awarded an asset which will pay him in excess of \$10,000 per year.² Based on this fact, we find the property division was not inequitable to him.

Patrick requested the return of certain items of personal property. Some he had received from his grandmother and others were of particular sentimental value to him. We determine he should receive his wedding ring, a 1934 World's Fair bracelet, a coin collection, his scarves and gloves, and some 1963 Kennedy half dollars and a floor lamp and shade that had belonged to his grandmother, and modify the dissolution decree to award these items to him.

We have considered all issues raised in the appeal, and affirm as modified above. We dismiss the cross-appeal. Costs of this appeal are assessed to Patrick.

APPEAL AFFIRMED AS MODIFIED. CROSS-APPEAL DISMISSED.

² According to the Mortality Table found in Volume IV of the Iowa Code, Patrick, who was fifty-four at the time of the dissolution hearing, had a life expectancy of 22.08 years.